

1 NOTICE: You are entitled to Judicial Review of this Order.  
2 Judicial Review may be obtained by filing a petition for Judicial  
3 Review with the District Court no later than thirty (30) days  
4 from service of this Order. Judicial Review is pursuant to the  
5 provisions of Section 2-4-701, et seq., MCA.

6 DATED this 25<sup>th</sup> day of January, 1991.

7 BOARD OF PERSONNEL APPEALS

8 By Alan L. Joselyn  
9 ALAN L. JOSCELYN,  
10 TEMPORARY CHAIRMAN

11 \* \* \* \* \*

12 CERTIFICATE OF MAILING

13 I, Kara Christianson, do certify that a true and  
14 correct copy of this document was mailed to the following on the  
15 25<sup>th</sup> day of January, 1991.

16 George Hagerman  
17 P.O. Box 5356  
18 Helena, MT 59604-5356

19 Edward G. Beaudette  
20 P.O. Box 1727  
21 Anaconda, MT 59711-0727

22 Richard Kirschner  
23 1615 L. Street NW, Suite 1360  
24 Washington, DC 20036  
25

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 62-89:

JAMES MYRICK, JOHN SEVORES  
AND ROD BERRY,

Complainants,

vs.

R. NADIEN JENSEN, JIM MAYES,  
SHIRLEY KELLY, KENNETH GATES,  
JUANITA WEIST, CRYSTAL TRAHAN,  
ROSE MARY GROSS, ALLAN  
GRANTHAM, AMERICAN FEDERATION  
OF STATE, COUNTY AND MUNICIPAL  
EMPLOYEES, MONTANA STATE  
COUNCIL NO. 9, AMERICAN  
FEDERATION OF STATE, COUNTY,  
AND MUNICIPAL EMPLOYEES  
LOCAL 1620,

Defendants.

F I N A L   O R D E R

\* \* \* \* \*

The Findings of Fact, Conclusions of Law, Recommended Order  
were issued by Arlyn Plowman on October 2, 1990.

Exceptions to the Hearing Examiner's Findings of Fact;  
Conclusions of Law; Recommended Order were filed by Edward G.  
Beaudette on behalf of the Complainants on October 22, 1990.

The Board reviewed the record and information submitted and  
considering the oral arguments, the Board orders as follows:

1. IT IS ORDERED that the Exceptions to the Findings of  
Fact; Conclusions of Law; Recommended Order are hereby denied.
2. IT IS ORDERED that this Board therefore adopt the  
Findings of Fact; Conclusions of Law; Recommended Order of the  
Hearing Examiner Arlyn Plowman as the Final Order of this Board.

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 62-89:

JAMES MYRICK, JOHN SEVORES AND)  
ROD BERRY, )

Complainants, )

vs. )

FINDINGS OF FACT;  
CONCLUSIONS OF LAW;  
RECOMMENDED ORDER

R. NADIEAN JENSEN, JIM MAYES, )  
SHIRLEY KELLY, KENNETH GATES, )  
JUANITA WEIST, CRYSTAL TRAHAN, )  
ROSE MARY GROSS, ALLAN )  
GRANTHAM, AMERICAN FEDERATION )  
OF STATE, COUNTY AND MUNICIPAL )  
EMPLOYEES MONTANA STATE COUN- )  
CIL NO. 9, AMERICAN FEDERATION )  
OF STATE, COUNTY, AND MUNICI- )  
PAL EMPLOYEES LOCAL 1620, )

Defendants. )

\* \* \* \* \*

I. INTRODUCTION<sup>1</sup>

A hearing on the above captioned matter was held March 23, 1990 in the Anaconda-Deer Lodge County Courthouse in Anaconda. The complainants, James Myrick, John Sevores and Rod Berry were represented by Attorney Edward G. Beaudette. The defendants, R. Nadiean Jensen, American Federation of State, County and Municipal Employees Local 1620, et al were represented by George Hagerman, Executive Director, American Federation of State, County and Municipal Employees Montana State Council No. 9.

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<sup>1</sup>It should be noted that the Hearing Examiner considered this matter simultaneously with ULP 64-89: Mason V. Jensen, American Federation of State, County and Municipal Employees, et al.

1 Arlyn L. Plowman was the duly appointed hearing examiner for the  
2 Board of Personnel Appeals. Testimony and evidence were sub-  
3 mitted and post-hearing submissions were filed. The matter was  
4 deemed submitted June 26, 1990.

## 5 II. BACKGROUND

6 On November 27, 1989, the complainants filed an Unfair Labor  
7 Practice Charge with the Board of Personnel Appeals alleging that  
8 the defendants violated Section 39-31-402(1) and 39-31-201 MCA  
9 when the defendants initiated internal union disciplinary action  
10 against the complainants. The defendants brought internal union  
11 charges accusing the complainants of violating of the American  
12 Federation of State, County and Municipal Employees International  
13 Constitution by attempting to decertify the American Federation  
14 of State, County and Municipal Employees as exclusive bargaining  
15 representative for certain Montana Department of Institutions  
16 employees on the Galen Campus of the Montana State Hospital.

17 American Federation of State, County and Municipal Employees  
18 Montana Council No. 9 filed a response denying the charges  
19 asserting that the defendants were lawfully defending their  
20 interests when invoking internal union disciplinary charges  
21 against the complainants.

22 On December 8, 1989, Joseph V. Maronick was assigned to  
23 investigate the matter. On December 15, 1989, an Investigation  
24 Report and Determination was issued finding sufficient factual  
25

1 and legal issues in dispute to warrant a finding of probable  
2 merit.

3 On December 19, 1989, Arlyn L. Plowman was appointed Hearing  
4 Examiner and a Notice of Pre-hearing Conference was issued  
5 January 5, 1990. On January 29, 1990, a Notice Scheduling  
6 Hearing was issued along with a request that the parties complete  
7 and exchange pre-hearing outlines.

8 The complainants' pre-hearing outline contained the follow-  
9 ing contentions:

10 That the disciplinary action instituted against Jim Myrick,  
11 Rod Berry and John Sevores were in retaliation for the  
12 complainants exercising their rights under the statutory  
13 Collective Bargaining Rights for Public Employees set forth  
14 in the Montana Codes and it is an attempt to coerce and  
15 intimidate other union members regarding the exercise of  
16 their collective bargaining rights.

17 The complainants defined the issue to be determined as  
18 follows:

19 Does the institution and disciplinary action against the  
20 complainants constitute an attempt of coercion and intima-  
21 dation in violation of Section 39-31-201 et. seq M.C.A. and  
22 Section 39-31-402(1) M.C.A. and therefore constitute an  
23 Unfair Labor Practice.

24 The defendants' pre-hearing outline contained the following  
25 contention:

26 That the defendants did not violate Section 39-31-201; 39-  
27 31-402(1) et. seq. M.C.A.

28 The defendant defined the issue to be determined as follows:

29 Does a disciplinary action against the complainants con-  
30 stitute a violation of 39-31-201 et seq. M.C.A., 39-31-  
31 402(1) et seq. M.C.A.

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### III. ISSUE

At the hearing, the issue to be determined was framed as follows: Were the complainants' rights under the Montana Collective Bargaining For Public Employees Act, 39-31-101 et. seq., MCA violated?

### IV. FINDINGS OF FACT

1. American Federation of State, County and Municipal Employees Montana State Council No. 9/American Federation of State, County and Municipal Employees Local No. 1620 is the exclusive bargaining representative for certain Montana Department of Institutions employees on the Galen Campus of the Montana State Hospital.

2. The complainants are employees of the State of Montana and members of a Galen Campus bargaining unit represented by the American Federation of State, County and Municipal Employees.

3. During the Spring of 1989, the complainants and other members of American Federation of State, County and Municipal Employees Local Union No. 1620 were active in an unsuccessful attempt to decertify the American Federation of State, County and Municipal Employees as the exclusive bargaining representative for their bargaining unit.

4. Following the defeat of the decertification effort, the defendants brought internal union disciplinary action against the complainants. In a September 12, 1989 letter to John Seferian, Chairman of the American Federation of State, County and Municipi-

1 pal Employees Judicial Panel, the defendants charged the com-  
2 plainants with violating the American Federation of State,  
3 County and Municipal Employees International Constitution by  
4 attempting "...to decertify their local for an 'independent' of  
5 their own creation...." The defendants requested that the  
6 judicial panel assume jurisdiction and the complainants, if  
7 found guilty, be a) fined of an amount equal to one year's dues;  
8 b) declared ineligible to hold any elected position in the union  
9 for four years; and c) be suspended from membership for two  
10 years.

11 5. The defendants' charges against the complainants were  
12 the subject of an American Federation of State, County and  
13 Municipal Employees Judicial Panel proceeding on November 30,  
14 1989 in Butte. The complainants left the judicial panel proceed-  
15 ings after raising legal and due process objections and before  
16 presenting a defense.

17 6. In a January 9, 1990 decision, Jeane Lambie, American  
18 Federation of State, County and Municipal Employees Judicial  
19 Panel member, found the complainants guilty of violating the  
20 American Federation of State, County and Municipal Employees  
21 International Constitution and expelled them from membership.

## 22 V. CONCLUSIONS OF LAW

23 1. The Board of Personnel Appeals has jurisdiction in this  
24 matter pursuant to Section 39-31-405 et. seq., MCA.  
25

1           2.    The Montana Supreme Court has approved the practice of  
2    the Board of Personnel Appeals using Federal Court and National  
3    Labor Relations Board (NLRB) precedents as guidelines in inter-  
4    preting the Montana Collective Bargaining For Public Employees  
5    Act as the state act is so similar to the Federal Labor Manage-  
6    ment Relations Act, State ex rel. Board of Personnel Appeals v.  
7    District Court, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297;  
8    Teamsters Local No. 45 v. State ex rel. Board of Personnel  
9    Appeals, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012; City of  
10   Great Falls v. Young (Young III), 211 Mont. 13, 686 P.2d 185,  
11    119 LRRM 2682.

12           3.    Pursuant to Section 39-31-406 MCA, the complainants'  
13    case must be established by a preponderance evidence before an  
14    Unfair Labor Practice may be found, Board of Trustees v. State of  
15    Montana, 103 LRRM 3090, 604 P.2d 1770, 185 Mont. 89. See also  
16    Indiana Metal Products v. NLRB, 1953 CA 7, 31 LRRM 2490, 202 F.2d  
17    613 and NLRB v. Kaiser Aluminum and Chemical Corporation, 24 LRRM  
18    2412, 217 P.2d 366, 1954 CA 9.

19           4.    Pursuant to Section 39-31-201 public employees shall  
20    have and shall be protected in the exercise of the right of self  
21    organization, to form, join, or assist any labor organization, to  
22    bargain collectively through representatives of their own  
23    choosing on questions of wages, hours, fringe benefits, and other  
24    conditions of employment, and to engage in other concerted  
25    activities for the purpose of collective bargaining or other



1 mutual aid or protection free from interference, restraint, or  
2 coercion.

3 Pursuant to Section 39-31-402 MCA, it is an Unfair Labor  
4 Practice for a labor organization or its agents to: (1) restrain  
5 or coerce employees in the exercise of the rights guaranteed in  
6 39-31-201 or a public employer in the selection of his represent-  
7 ative for the purpose of collective bargaining or the adjustment  
8 of grievances; (2) refuse to bargain collectively in good faith  
9 with the public employer if it has been designated as the  
10 exclusive representative of employees; (3) use agency shop fees  
11 for contributions to political candidates or parties at state or  
12 local levels.

13 5. National Labor Relations Board precedent holds that a  
14 labor organization restrains or coerces employees in the exercise  
15 of their Section 39-31-201 rights when it fines a member for  
16 supporting a decertification effort. However, it is also well  
17 established that a labor organization may expel a member for  
18 bringing a petition for its decertification. See Tawas Tube  
19 Products, Inc., 58 LRRM 1330, 151 NLRB 9, February 15, 1965;  
20 National Labor Relations Board v. Molders Local 125, 77 LRRM  
21 2067, 442 F.2d 92 1971 CA 7; and Steelworkers Local 4023, 60  
22 LRRM 1008, 154 NLRB 692, August 25, 1965 affirmed in Price v.  
23 National Labor Relations Board, 64 LRRM 2495, 373 F.2d 443, 1967  
24 CA 9, cert. denied, 68 LRRM 2408, 392 US 904, June 10, 1968.

1 In International Molders' and Allied Workers Local  
2 No. 125, AFL-CIO (Blackhawk Tanning Co., Inc.) the  
3 Board (National Labor Relations Board) held that while  
4 a labor organization may properly seek to defend its  
5 status as collective-bargaining representative by  
6 expelling employee-members who filed decertification  
7 petitions or participated in activities in support  
8 thereof, it may not fine a member for filing a decer-  
9 tification petition since that action is punitive and  
10 improper rather than defensive and, therefore, in  
11 violation of the Act:

12 "In short, where the union member is seeking to  
13 decertify the union, the Board has said that the public  
14 policy against permitting a union to penalize a member  
15 because he seeks the aid of the Board should give way  
16 to the union's right to self-defense. But when a union  
17 only fines a member because he has filed a decertifica-  
18 tion petition, the effect is not defensive and can only  
19 be punitive - to discourage members from seeking such  
20 access to the Board's processes; the union is not one  
21 whit better able to defend itself against decertifica-  
22 tion as a result of the fine. The dissident member  
23 could still campaign against the union while remaining  
24 a member and therefore be privy to its strategy and  
25 tactics. Teamsters Local 165, 86 LRRM 1433, 211 NLRB  
707, June 18, 1974 (citations and italics omitted).

6. Pursuant to the foregoing, it was an Unfair Labor  
Practice for the defendants to seek to discipline the com-  
plainants with a fine for supporting the decertification effort.  
However, that matter was rendered moot when the American Federa-  
tion of State, County and Municipal Employees internal procedures  
denied the defendants' request for a fine. Steelworkers Local  
4028, 60 LRRM 1008, 154 NLRB 692, August 25, 1965 affirmed in  
Price v. National Labor Relations Board, 64 LRRM 2495, 373 F.2d  
443, 1967 CA 9, cert. denied, 68 LRRM 2408, 392 US 904, June 10,  
1968. See also Wiglesworth v. Teamsters, 93 LRRM 2801, 552 F.2d

1027, 1976 CA 4 cert denied, 95 LRRM 2575, 41 US 955, June 6, 1977.

It was not an Unfair Labor Practice for the defendants to seek the complaints' expulsion.

7. The complainants' arguments regarding the Bill of Rights of Members of Labor Organizations, 29 USC 411, found in the Labor-Management Reporting and Disclosure Act of 1959 must be dismissed. American Federation of State, County and Municipal Employees Montana Council No. 9 and American Federation of State, County and Municipal Employees Local 1620 are excluded by definition from coverage by that Act which excludes public employee organizations from its definition of labor organization, 29 USC 402. See Smith v. Professional Employees, 125 LRRM 3294, 821 P.2d 355, 1987 CA 6.

#### VI. RECOMMENDED ORDER

The above captioned matter is hereby dismissed.

#### VII. SPECIAL NOTICE

Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed within twenty (20) days of service thereof. If no exceptions are filed, this Recommended Order shall become the final order of the Board of Personnel

1 Appeals. Address exceptions to the Board of Personnel Appeals,  
2 P.O. Box 1728, Helena, MT 59624-1728.

3 Entered and dated this 2nd day of October 1990.

4 BOARD OF PERSONNEL APPEALS

5   
6 Ailyn L. Plowman  
7 Hearing Examiner

8 \* \* \* \* \*

9 EXHIBIT LIST

10 DEFENDANTS

11 Exhibit D-1 (Stipulated) Unfair Labor Practice Charge 62-89 with  
12 attached September 12, 1989 letter to John Seferian

13 Exhibit D-2 (Stipulated) defendants' December 13, 1989 response  
14 to Unfair Labor Practice Charge

15 Exhibit D-3 (Stipulated) January 9, 1990 Decision in Judicial  
16 Panel Case No. 89-76 Kelly et al v. Myrick et al

17 Exhibit D-4 (Stipulated) January 29, 1990 Notice Scheduling  
18 Hearing

19 COMPLAINANTS

20 Exhibit C-1 (Stipulated) transcript of proceedings in Kelly et  
21 al v. Myrick et al, JPC No. 89-76 (Judicial  
22 Proceedings Transcript with attachments)

23 Exhibit C-2 Local 1620 Financial statements (admitted over  
24 defendants' relevancy objection)

25 Exhibit C-3 Handwritten letter from Rod Berry (admitted over  
26 defendants' hearsay objection)

27 Exhibit C-5 (Stipulated) International Constitution, AFSCME.